Channing (Walter)

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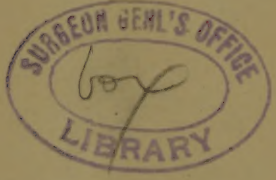

With Dr Channing's Regards

REVIEW OF

ELWELL'S MEDICO-LEGAL TREATISE

ON

MALPRACTICE AND MEDICAL EVIDENCE.*

BY WALTER CHANNING, M. D.

[Re-printed from the Boston Medical and Surgical Journal.]

FONBLANQUE, a distinguished English barrister, and Paris, an equally distinguished physician, united their forces and professions in a work on Medical Jurisprudence, and the product of the connection was an excellent treatise on that important subject. It sometimes reminds us of the tessellated piece of mosaic of Burke, with here a bit of black stone, and there a bit of white; but it loses not an atom of interest in the admixture, or the variety. We are reminded here of an edition of Blackstone's Commentaries, with notes by an American barrister named *White*, and to which the above quotation from Burke was with great felicity applied by a brother limb of the law. But let this pass.

We have just read a new American work on Medical Jurisprudence, the literary history of which reminded us of the co-partnership of Paris and Fonblanque. Dr. Elwell, the author of the volume before us, having studied and practised medicine for several years, turned over a new leaf, and studied and practised law for as long a time, and now presents us with the product of the two professions, united by a Siamese form of attachment, which

* A Medico-Legal Treatise on Malpractice and Medical Evidence, comprising the Elements of Medical Jurisprudence. By JOHN J. ELWELL, M.D., Member of the Cleveland Bar. "A doctor who knows nothing of law, and a lawyer who knows nothing of medicine, are deficient in essential requisites of their respective professions."—DAVID PAUL BROWN. New York: John S. Voorhies, No. 20 Nassau St. Cleveland, Ohio: Alfred Elwell & Co. 1860.

makes it as easy to work for and with one, as for and with the other. The design in this work, it will be seen, is novel, and it is excellently well accomplished. If it do not sustain the old adage that two of a trade can never agree, it certainly does prove that two of the most diverse callings may act in perfect harmony, and for the equal benefit of both.

Dr. Elwell's work is divided into forty-two chapters, fifteen of which, or 232 pages, of 582, are devoted to malpractice. This, perhaps, is the most important part of the work. It treats of malpractice in all its varieties—with highly interesting illustrations in adjudicated cases, drawn from the very best sources in the books of both Europe and America. The arrangement of the various subjects treated is excellent; and the references to the highest authorities will enable the reader to consult them with perfect ease. In this part of the work the author has furnished abundant proof of careful, honest study, and the best evidence of the value of his work.

Following Malpractice, are several chapters on Evidence, its principles and application. We have in this department the same assurance of the fidelity of the author as in the preceding. To the physician these chapters are of special value. In no department of professional duty does he meet with so many and so grave embarrassments, so much often to regret, or to be mortified about, as in that which connects him with the administration of the criminal law; and grateful must he be to him who has done so much to make these evils less. Dr. Elwell has labored to make clear to the medical man this very obscure subject. He knows what the medical man most needs in preparation for his public duties. His two professions have taught him what these duties are, and what is required in their performance.

The next subject is Insanity. In treating this we are very glad to find so much thought and space devoted to Moral Insanity, so called to distinguish it from the intellectual. We do not quite agree with Dr. E. in regard to this very interesting subject; but are willing to confess that we have not met with any discussion of it which has appeared more free from prejudice.

The next, and closing, chapters are on Poisons, Infanticide, Wounds, Rape, Coroner's Offices and Inquests.

Criminal Abortion has a distinct place in this work, and quotations are made from Dr. H. R. Storer's valuable contributions to

this subject. Especially valuable are his statistics, which show how wide spread is this crime; and physicians know how frequent is criminal abortion in this State of Massachusetts, and in this city of Boston.

Mrs. A. called on Dr. —— for some uterine trouble, and expressed a strong will to have children. "Have you ever been pregnant?" "Yes, twice. It happened soon after I was married, several years ago, and I had abortions produced, because it was very inconvenient for me to have a family so soon after marriage. For years have I wished to have children, and have failed. I am nearly 40, and the time will soon have gone by for me to have them. Mrs. ——, my friend, does not mean to have children, and has miscarried several years in succession. Her health is perfect, and her abortions give her no trouble." From this history it would seem that Mrs. —— thinks it a sort of moral duty to get rid of the fœtus as soon as she knows she is pregnant. She has no desire for, or interest in, children, and would not know what to do with them. If she must conceive, she says she has a perfect right to get rid of the product of conception.

A case is in mind in which abortion was produced by the pregnant woman herself. She was quite young—16 or 17—had been married three months, had twice missed the catamenia, and, from this and other signs, believed herself pregnant. This was wholly unexpected to her. It surprised her, and she was determined not to submit to it. Various means were resorted to. Among others, and the last, was spurred rye. She got a quarter of a pound of the powder, and literally eat it all, and this rapidly. Violent and steady pain occurred in the abdomen, with swelling and soreness. Intermitting bearing-down pains at length came on, with hæmorrhage, and we were sent for. Things were found as above described, and the ovum partly out of the womb. It was soon expelled, and comparative ease followed. After very serious and dangerous illness the patient recovered. In this case the abortion was not the result of *specific* action of ergot. The womb was called into morbid action in consequence of the universal disease produced by the spurred rye. The woman was poisoned by it, and it was entirely through the constitutional disturbance produced, that the expulsion of the ovum took place. We have no *specifics* for producing abortion. Death frequently follows instrumental abortion, and when this is not its consequence, we have often produced diseased conditions which are never recovered from.

But why multiply instances? What is the remedy of so much evil? It has been looked for in law. But, as is shown in a late number of this JOURNAL, without effect. And why this? Because it is impossible to obtain witnesses of the commission of the crime. If the woman gets well, she will never criminate herself. But if she dies? The law cannot reach such a death. The woman goes alone to the abortionist's house, and there the operation is done. She goes home, is seized with flooding, inflammation, and dies. Suppose the agent is suspected, and the suspicion leads to his arrest. The government can do nothing. The plea is "not guilty," and who is in court, or who can be found to gainsay it? We have talked with a late attorney for the County of Suffolk. He said he had never gained a conviction. Cases had occurred which promised success, but had entirely failed. We have heard of a case which promised better. The woman went with a friend—the abortion was procured, and the woman died. A person was suspected of the crime, was arrested—but he *married the friend.* She was the only witness, but her competency, as such, was destroyed by the coverture. The above is given as reported, and is one of the most extraordinary cases in the history of our criminal abortion. It shows more strongly than any other how useless is law in such an application. It were ludicrous, this mode of escaping the law, were there not so much that is immeasurably sad and terrible connected with it. Here was a double killing of mother and child; and most likely under an assurance that one party at least would be safe.

An instance is in my memory, somewhat like the above, at least as showing how ineffectual is law here. A woman who had suddenly disappeared from her place of residence was traced to Boston, and to the house of an abortionist in very large business, now dead. She was next traced to Cambridgeport, where she became suddenly ill. She died soon after giving birth to a child of a few months from conception. There was an autopsy, and peritoneal inflammation, extensive and strongly marked, was found. She was brought to Boston and buried in the cemetery on the Neck. A stranger, wearing a white hat, was in the graveyard at the burial, and was carefully observed by the undertaker and his assistants. Persons who had learned the whereabout of the woman—her friends—came to Boston to examine the body for identification. The grave was opened, *but the body was gone.* The stranger with the *white hat* was described to these friends, but circumstances arose which put an end to further investigation. We see in such cases as these

where is the real difficulty in their legal investigation. There is no such interest in the discoveries of the law, as there is sympathy for the dead, and this sympathy exists in the hearts and minds of the nearest and dearest friends. They want to learn what has become of the missing, and if dead and buried, where? Their errand is to the grave, and with its revelations the scrutiny ends. And is not all this too natural not to be even sympathized with, out of the circle in which the death and the crime have occurred? Brutuses are not in the roll of the latest civilization, and a father would shrink from the bench were a son on trial for his life. And so do friends of the betrayed or voluntary criminal from those who destroy, or who have destroyed, the evidence of her guilt.

Many, many cases are in memory of women who have produced abortion on themselves. Many, many of these have suffered long afterwards, and many have had disease and permanent invalidism follow, making their lives most miserable. A question occurs, shall the physician attend such cases, either in their acute or chronic stages? This question is alluded to because it has been raised; not that we raise it. The answer is at hand. We must always minister to disease. Sydenham settled this case for himself and for his profession long ago. He was asked if one is obliged to attend cases of syphilis—or whether such attendance did not tend to encourage vice. Sydenham's answer, if memory serves, was that the paramount duty of the physician was to cure disease under whatever forms or circumstances produced—that this duty involved the investigation, the study of all diseases; to cure and to prevent after-morbid consequences, as in the instance of syphilis. We are for the most part obliged to act as the indications of these cases of abortion suggest, for it is rare with us to get confession of what we believe has been done, and has made the case what it is. But the confession is sometimes volunteered, and especially when chronic disease, the consequence of procured abortion, comes before us for relief. And if made, how often is it with circumstances which, if they do not palliate the wrong done, in our own apprehension of it, show under what almost irresistible motives it has been accomplished. Among these are the memories of mature labors, the subsequent illnesses and dangers, the inability to nurse and the consequent disease and death of children, the want of means to support a family. In such cases as these have we not mental conditions which to the sufferer present reasons for acting which are not

controllable, or in which responsibility almost ceases? Take, then, into account also, the mental and physical attendants on pregnancy, especially early pregnancy—the signs, or, more correctly, the diseases of that state, and we may understand at least what are the difficulties of enduring such state, and the strength of that temptation to have done, or to do, what will end them. And last, but not least, the deep, deep sense of shame with which pregnancy and mature childbirth are regarded by the unmarried. No one but the physician can understand what are the mental states of such persons—how nearly they approach to, if they do not reach, that of insanity. Every sort of motive—appeals are made to his deepest feelings, money is offered, considerations of character pressed with almost irresistible eloquence, ruin here and hereafter, tears, entreaties, everything is said and done which can be addressed to him, and he resists it all. He states the dangers of the process to destroy pregnancy, the criminal character of the act, the weight of the law. The applicant is not convinced. She leaves him, and either finds some other agent, or accomplishes the object herself.

In what is here said of circumstances which may explain, but hardly palliate the voluntary abortion, our reference in part is to married women who have already suffered gravely during pregnancy, and more especially during delivery, so that to die would be gain, if death offered the only means of preventing such protracted, such intolerable suffering. Resort to abortion in such cases is, as far as we are acquainted with instances, exceedingly rare, and they have been revealed to us in order to explain existing chronic diseased conditions, assist their investigation, and to guide the treatment.

There are cases in which premature labor may be induced to save mother and child. We refer to instances in which there is so much deformity and consequent diminution in the pelvis as will prevent the mature fœtus passing. In such cases, labor may be induced at the seventh month, with good chance of preserving the life of both fœtus and mother. If so much deformity exists that a seventh month child cannot pass, then labor should be induced earlier. All writers agree that the mother must partake with the child in the dangers of both premature and mature delivery—in other words, the fœtus, or unborn child, is to be sacrificed only when the safety of the mother without question demands it. If it

is fully ascertained that the fœtus is already dead, that mode of delivery which will best secure the parent's safety should be adopted.

There is one other contingency under which abortion or premature delivery may be induced, viz., the presence of such diseases or conditions of pregnancy as, if allowed to continue, may prove fatal; and for the cure of which the best means have been faithfully tried, and in vain. Thus, vomiting in the early or late months may be so constant and so severe as to threaten life. This may be good reason for forced delivery.

We believe we have stated all the contingencies which may justify abortion or premature delivery.

The Physician in Court.

The physician may be in court as a witness, as plaintiff, and as defendant. Under whatever circumstances, it is one of the most disagreeable calls he may ever be required to make. Let us look at him there as a witness—as an expert.

Is he obliged to go? Yes.

How is his presence there required? By summons.

He cannot resist it? No. Should he fail to obey the summons, this would be contempt—a malicious act—and punishable by fine or imprisonment, or both.

If very inconvenient to him to go at the moment, may he delay attendance? This depends on circumstances. We had, between one and two o'clock, one summer's day, just driven to our door, and was getting out of our carriage, when, at that moment, a person stepped up with a paper in his hand, which proved to be a summons requiring our immediate attendance at the Supreme Court. This was peremptory enough. So off we went, whip in hand, to court. The cause was an amicable one, between the heirs of a large estate, one of whom had been born after the death of his father, and the question related to the legitimate length of pregnancy. I asked for a copy of Hargrave and Butler on Coke on Littleton, for in it is an opinion of William Hunter on this important subject, and a higher authority does not exist. The book was brought, the opinion found, read, and our humble testimony given in its support, and our office in court, for that time at least, was accomplished, and we have no doubt that the posthumous young gentleman got his share of his father's property. For ourselves, and our office, we got seven-and-

sixpence, and four cents for travel, it being a presumption, or a fiction of law—it was clearly the last—that the travel from our door-step at or near the corner of Tremont and Court Streets, was a measured mile from the Court House in Court Square—a mile which we got over much under 2.40.

The physician is called into court as a witness in the most important causes—causes in which life, or honor, or property are at stake, and in the determination of which he is to be an important agent. In the performance of his office his own character takes, or has, a deep interest. As an expert, he is understood to be thoroughly acquainted with the most important portion of the subject matter before the court; and on his skill or ability to present his knowledge on questions involved, may the result of the trial depend.

What now are the facts in such a history which makes the office so peculiarly embarrassing to the medical man?

In the first place, these come out of his personal, intellectual, moral and physical endowments—of his knowledge, his moral power, and his manner.

Who are his audience? Twelve men—the jury.

Why this number? In early England, the jury was composed of all the freemen, having a certain money qualification, in any place in which a court was sitting; a majority of twelve of these decided any cause in hearing. But why twelve now? The oldest vestige of this change is found under Henry II., in the Constitutions of Clarendon, so named because they were made in a parliament held in a small English village of that name, in 1164, and in Northampton in 1174. Civil as well as criminal contests were now to be decided by twelve respectable men of the neighborhood, and from this time the trial by jury has remained unaltered in England, and in America, to which the English colonists brought it, the unanimous vote of the twelve only giving a valid decision, which was the verdict—*true word*. Thus were the people and their affairs, when in controversy, tried by their peers. In the House of Lords, however, matters were managed differently. The lords being peerless, could only be tried by themselves, and so each lord votes. But a majority of twelve votes is necessary to a valid condemnation. The right of peremptory challenge differs in the jury of twelve, and that of all the lords. The accused may challenge twelve of the former body. In the last, thirty-five, or one less than three times the number required for conviction in the jury of twelve.

Henry killed, or had killed, Thomas à Becket. B. had already provoked the king's displeasure in 1163, the year before that of the celebrated Clarendon constitution; and to this he swore he would never assent, on account of some provisions concerning the clergy. Becket at last assented to it. Then followed much more to irritate Henry; until at length he commissioned four men to kill him, which they did. May we not pardon this act of terrible violence, in the memory and enjoyment of the blessings which have come out of the final settlement of the trial by jury?

We said the jury is the proper audience of the witness. To it is he specially to address himself. He is to look at them; and if he have any perspicacity, he will see what is the force of what he is saying—whether he is understood; at the least he will see if he have so aroused the attention of his hearers as to secure its continuance; nay more, increase it by what follows. Here are twelve men to decide whether a murder has been committed, and whether by the accused. It were desirable that they were all equally capable of instruction by the professional witness—the expert. This is not to be expected. The jury are chosen by ballot, a great number of names being in the box. Inequality in ability cannot be avoided; and it is not to be desired that all be equally capable. Of twelve men taken at large, some one, two or more may understand sufficiently well for all practical purposes, what the witness says; and a larger number may see in the manner of the witness, that he is honest and sincere in what he says. They may feel the moral, if they do not comprehend much of the intellectual; especially may they be in a state to be usefully influenced by what those most taught by the evidence, the counsel, may communicate to them in his pleading. This perhaps is all that is reasonably to be looked for from the jury, and is it not enough?

It has been suggested that it were better to choose the jury from the professions. Physicians are exempt by law. Lawyers are so from their relation to the administration of the laws. And so are ministers, presidents and faculties of universities, heads of incorporate academies, &c. It may seem singular that the best instructed persons in any community are exempt. But is it not well and wise that it is so? Suppose for a moment that it were not so, and that physicians, ministers, and college men, formed a part or most of the jury. Is it at all probable that a verdict would ever be rendered—that such men would ever agree? You might

starve them out, but it is seriously to be questioned if more than one would not be found in every jury who would have to complain of the incorrigible obstinacy of all the others. The jury, as at present provided for, is the most important of all social institutions. It makes safe, life—honor—property. In its simplicity is its beauty and power, and who does not venerate him who gave to it its present simple, its wise, its whole life and agency? Is it not, of human institutions, the most perfect in its operation, and most to be honored and valued for its wide and important benefits?

But however important is the function of the jury, and especially its agency in its relation to testimony, the witness is not the only, or the final portion in the apparatus of a civil or criminal prosecution. In a work lying before us is the following, which has a bearing on this point:—

"In every case, the last impression of a jury will be the decisive one. The charge, by which, after the termination of the debates, the presiding judge, versed in the law, seeks to guide the deliberations of the jury, and aid their untaught judgment, may contribute, indeed, to remove this and the deficiencies remarked below, but the force of it is very inconsistent with the object of jury trials; for it makes him, in most cases, master of the judgment. One may generally foretell, in England, the verdict of the jury from the charge of the judge."

How far this may be the case in America, we do not know. But that it does not always happen that the judge's charge determines the verdict, an instance may be given where it signally failed. A judge of a supreme court, now dead, made of his charge an argument for one party, and with the earnestness and eloquence of a very liberally-feed advocate. The jury's verdict was for the other side. A chief justice, meeting his associate the next day, having seen a report of the action in the morning papers, looking at him with the tail of his eye, said to him, "Brother, I see you lost your cause yesterday."

In a capital trial, after the evidence was all in, Mr. Justice ——, of the U. S. Supreme Court, said to the U. S. Attorney, "perhaps the counsel for the accused will let the case go to the jury without argument." After consultation between the counsel, the attorney reported to the court that he agreed to what the judge had suggested. As he arose to address the jury, that body also rose. Judge —— begged them to resume their seats, and proceeded at first with the evidence, and then with the argument. It was the most touching scene we have ever, in a long life, witnessed. It is rare, we think, that the offices of advocate and judge are by consent, and in a capital trial, confided to the court; and never have

we listened to an argument more eloquent. When the judge had taken his seat, the foreman took the sense of his brethren of the jury as to their verdict. It was unanimous for acquittal. And for once the spectators were allowed, without check, to express the pleasure with which the announcement was received.

The physician is summoned by the government or the defence. He is a witness for both. The examination *in chief* being finished, he is passed to the cross-examination, with a "*the witness is yours.*" This relation to a trial should never be lost sight of by the witness. It aids him in every way. He is for no party. He is for justice, not for a man. His memory is aided, and he keeps to his facts. If he goes for a moment out of these, it is only to give them more life—more force. No matter what may be the tone of the cross-examination—no matter what the effort to break him down. He is calm—firm—cool. He knows the object which would now oppress him—viz., a verdict—and he feels, if he feel at all, that that is the true object of the issue. The deep sense of duty—the solemn precept under which he speaks—the deep sense of his whole responsibleness, never hurts him. It amazingly helps him, and makes noble and true—at least to himself—what he says. The jury always sees this, and for defence nothing can be stronger.

The physician in court must carry with him all the knowledge of his case which he can possibly attain to. He is to make a diagnosis both differential and direct. He may get previous knowledge at second hand, through counsel, or from the accused. He is consulted. The case is stated. His views of it obtained. If to be summoned, he knows it, and makes preparation for his office. However the mode, let him get knowledge—wisdom—for it will be truly power to him.

A question arises here, which it is very important to answer. Is the expert to believe all he learns? His belief must often be much after the order of faith, as is the case in his daily professional relations—it must be very much the substance of things hoped for, the evidence of things not seen. He may be told that the opinions of an expert are facts in law—another mode of presenting the apostolic formula. But of infinite importance is it—this character of his opinions—when looked at in their legal significance. It invests what we may say in court with sacredness, and with beauty. It gives to ratiocination that mighty alchemy

which converts thoughts into things—thoughts which Mr. Coleride says are stronger, of infinitely more power, than are things, which are matters to be seen, before believed—thoughts which cannot be seen, but like the hidden principles which govern the physical world, are the basis—the foundations—of human action as well as belief.

Is the physician compellable to reveal what has come to his knowledge in his professional relation to patients? On this subject, Dr. Elwell has the following:

"This (compellability) is the Common Law rule undoubtedly, in both England and this country; while some of the States, like New York, Missouri, Wisconsin, Iowa, Michigan, and perhaps some others, have passed a statutory rule on the subject, in the following language: 'No person, duly authorized to practise physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe to such a patient as a physician, or to do any act for him as a surgeon.' But a physician consulted by the defendant in an action on the case for seduction, as to the means of producing abortion, is not privileged from testifying under this statute, as the information was not necessary for a proper prescription."—P. 320.

"By the laws of New York and Missouri, no minister of the Gospel or priest, of any denomination, is allowed to disclose any confession made to him in his professional character, in the course of discipline enjoined by the rule or practice of his denomination."—P. 328.

Difference of opinion prevails on this important subject of privilege. By far the larger number who have treated it, deny the privilege. Very respectable authority, however, and Greenleaf among them, argue for it. Among physicians are John Gordon Smith, of England, and Charles A. Lee, the American editor of Guy's Forensic Medicine. Attempts have been made to avoid the disclosure of secrets of the professional relation of medical men. But they have always failed under the rule of the Common Law. Statutes may ride over this, as in the States alluded to. In England, Mr. C. Hawkins, in a celebrated peerage case, demurred to a question which involved facts which had come to him in his professional attendance on the Duchess of Kingston. But upon consultation, the court required his testimony, on the ground that such testimo-

ny was not privileged. We remember a case in which a physician claimed the privilege of the Catholic clergy, and refused to testify, but his claim was not allowed. Our author, in the passage quoted above at length, on the statute of several States which exempts experts from testifying to facts disclosed by professional interrogatories, says—"But a physician consulted by the defendant," &c. &c. We question this position, on the ground that the knowledge of the means by which abortion has been procured may be absolutely "essential to a proper prescription." All sorts of means are used. We have in mind one in which the person used quite a novel method to procure abortion upon herself. She first tried wire, but it failed, as it stuck into the vagina and so was fixed. She withdrew, and *bent* it, pressing the bent portion very close to the shank, thinking it would retain its position. It went readily into the womb; but to withdraw it was impossible—*facile est descensus.* After taking all the pains, and pain, she could take, or bear, she gave in, and sent for her medical man. He tried and failed. We were next summoned, and we failed. Our object was to introduce the finger into the womb, then to press the wire upwards so that its point should be free, and then, by resting the point on the end of the finger, to withdraw them together. It was impossible to dilate the os and neck sufficiently to do this. We left, to come again in the afternoon, and try another method.

In our absence, and to facilitate matters, the attending physician cut off the wire (as it hung awkwardly out of the vagina), and as close to the os uteri as his instrument would reach. This prevented all further attempts at reduction. Many years have passed since this strange passage in Mrs. ——'s life. She has been perfectly well. The wire remains in *statu quo*, and, what is almost as strange as any other fact in the history, she was *not pregnant* when she attempted abortion; nor has she been pregnant since.

The medical man is not compellable to answer a question, if the answer can make him liable to a criminal prosecution. Mr. Surgeon Patmore went out in a duel as a surgeon. One of the parties was killed. The survivor was tried, and Mr. Patmore was summoned as a witness. A question was put to Mr. P.; but before it was answered, the presiding judge said that if in his answer anything might be contained which would render him liable to a criminal prosecution, he was not bound to answer it. Mr. P. said that he should not answer it. The government in this step proba-

bly deprived itself of very important testimony, rather than act unjustly towards a witness, or withhold from him the protection of law.

It was said that the physician in court should be calm—sustained by his knowledge—in his intellectual and moral repose, and most careful to avoid the position of a partizan. He is tempted to a different course than here indicated. In court, he is out of the sick chamber. In the latter he is a ruler. His office is the highest delegated to man. He is to do all man can do, to lessen suffering, and to save from death, and he acts with the great advantage of possessing the confidence of the sick, and of their friends. He is here a questioner. He examines the sick, and their attendants; and it is understood that the strictest scrutiny is to be daily made into all which relates to the case. The strong motive of interest secures fidelity in the questioned. The physician here is the Supreme Court as well as counsel. He collects the evidence, and passes judgment.

In court, the reverse of all this is the position of the physician. He is literally put *to the question*. All sorts of questions are put. Some of them it is not possible to answer. They are nothing but confused, impossible statements, offered as possible—as having a relation to matters under inquest, but which absolutely relate to nothing. Another mode of presenting the question is asked for. This is attempted, but it is clear to the witness that nothing can come of nothing, as it was when the same apothegm was propounded ages ago. Nay, what is still worse, when the question seems to have a meaning, the answer may be all Greek to the inquirer. It is hard to avoid technicalities in these matters. But words in common use in physic and in law, are not correlative. Thus, *descent*, in law, is the transmission of the right and title to lands to the heir, on the decease of the proprietor, by the mere operation of law; the operation of no principle whatever. In surgery, *descent* means *hernia*, and is a result of a principle in physics. Again, *jactitation*, in medicine, means the irrepressible tossings of the patient in acute disease—often a most alarming symptom. In law, *jactitation* is a purpose of marriage. Then, *action*, and *case*, have their meanings in law, in nothing resembling those in medicine. In the latter, *action* means function, whether healthy or morbid; *case* means disease, as manifested in its subjects. We need not offer other instances. How difficult must it be to reach the whole truth, when

sought for under such circumstances. And yet, life may be at stake. It may happen that the medical witness gets some notion of what is demanded of him, and his reply may show it. He may sometimes hypothetically answer in such a case, and so render important service to both counsel and issue. If his mode of regarding, or of putting the question, fail to accomplish the object proposed, the counsel will say so.

There is another matter connected with the present, which deserves distinct notice. If the expert does not understand the question, it is very often his best course to acknowledge his ignorance of the subject. Let this be done distinctly. The question may be presented in another form. If not understood, let this be at once stated. A medical witness is sometimes tempted to cover his ignorance by giving an opinion touching the point presented, and which point involves a fact. The witness, we are persuaded, will in such a case do more by a simple *no*, than by the best circumlocution he may resort to.

In his manner, the medical witness should manifest his sense of the importance of his office, and in the best way meet its requirements. Deliberation in manner can hardly be ascribed to doubtfulness as to communications in court, if distinctness—occasional emphasis—accompanies it. At times, a question, having an important relation to the case, is put after such a manner as declares its whole meaning. Such a question may require thought. It is to be seen by the witness in all its bearings, and should be answered accordingly. When this is done—ably, thoroughly done—the witness will see its effect on the jury at once, and feel how important is the point which has been gained. No physician was ever on the stand who has been able so to accomplish his important office, who has not seen what he has effected, it may be in the gravest issue; and felt the satisfaction which such a service to public justice always brings with it.

We remember a trial for murder, of singular obscurity, making the office of the professional witness exceedingly embarrassing. A witness who preceded us, was almost ludicrously deliberate. The day was hot, and the witness was long on the stand. He was very thirsty, and frequently called on an officer of the court for cold water. He would always wait at rest till the water came. After the trial, we asked him how he had succeeded on the stand, for he was long under the harrow. Said he, "The day was

very hot, and I was very thirsty, and I always found myself most thirsty when I did not fully understand the question. So while the officer was gone for water, I thought over the question and the answer. I never drank so much water, in the time, in my life." I afterwards asked the counsel for the prisoner, what sort of a witness was my friend, Dr. —— in ——'s case. Said the counsel, "I never had a better witness."

It was in this case that the above legal friend told me of a witness who broke in upon him one evening when he was exceedingly occupied in preparing for the next day, saying that he had a very important witness for the defence. "Who is it?" asked Hon. Mr. ——, with much temper. "An angel appeared to me last night, Sir, and said that Mr. —— was innocent." "Let him be summoned!" screamed out the irritated counsellor.

In this case a medical witness for the government sat at the elbow of the Attorney General while we were undergoing cross-examination, and was seen to be passing slips of paper to him on which were questions for us to answer. Of these questions, the Attorney probably knew as much as the jury, and my answers being strictly professional in meaning and technical in language, as such questions from such a source strictly demanded, it is very probable that little light was shed. We hardly know of a more mistaken and absurd mode of reaching useful knowledge than this, where experts are witnesses.

Questions are sometimes put which cannot be answered, and others which should not be answered. For the most part these last arrest the attention of counsel for or against, and an appeal to the court for judgment is made. But sometimes questions get in without challenge, which the witness believes he is not obliged to answer. In such a case he has a perfect right to appeal to the court himself. We have been in situations in which such appeals have been made. In a trial for murder, we had been some hours on the stand, and were about leaving it, when the prosecuting officer said he had one more question to ask. It was, if it were not possible for us to have been influenced by our views of capital punishment, in our testimony. We appealed at once to the court, addressing the Chief as follows:—"May it please your Honor, I am surprised at this question of my learned friend, for at the very last term of this court I was called by the government in a trial for an alleged murder. I wrote at once to my friend, the present

public prosecutor, stating at much length my views of capital punishment, and asking if he might not think that they would bias me in my testimony. My friend has probably this letter still in his pocket. My views were not regarded as objections to my appearing for the *government*. But now, please your honor, when I appear for the *defence*, I am questioned concerning bias. Am I obliged to answer the question?" The answer was, *No*. The great auditory showed their pleasure at the answer.

In another capital trial, certain women of most abandoned character being at the time in the house in which the alleged felony was committed, were the principal witnesses for the government. We were leaving the stand which we had occupied for hours, when the attorney for the government said he wished to ask another question, viz., if our testimony might not have been influenced by the character of the government witnesses. We again asked the judgment of the court. We asked, if we were the judges of these declared infamous witnesses of the government—whether, if their character was such as to destroy their credibility, they should have been witnesses at all—and more to the same point; the appeal ending with the question if we were obliged to answer the inquiry. It was ruled that we were not. We believe that the effect of these questions and these answers upon the jury was as much for the benefit of the prisoner, if not more, than any part of our testimony in chief; and in this way. It settled the moral character of that testimony, and this was much more likely to influence the twelve men, than the best scientific statements and arguments an expert can present. The people felt it.

We have seen the same or a similar effect produced in another way. This was in a case of capital felony, in which we were called as an expert. Our appearance in the court was objected to by the government, in a manner so nearly approaching rudeness, that it might have annoyed a sensitive person, but we had very often been in court before, and were not troubled. The court ruled that our appearance was not necessary. Our office would have been to have rebutted the testimony of another medical witness, which had been given the afternoon before. The ruling was of course decisive, and for ourselves we had no occasion to complain of it. We kept our eye upon the jury during the arguments against our appearing, and it was clear to us that the effect upon it was for the benefit of the accused. They saw and felt that there would

not have been so much effort made to suppress our testimony, if it was not believed by the government that it would have had some important influence upon the jury. Silence here was gold!

A medical witness is not allowed to read books on the stand. He sometimes attempts to do so, because he does not know the rule of law concerning this matter. The ground on which the rule depends, is a singular one. It is, that the presiding judge can consult authorities, or read books, as well as the physician. A question arises—does the judge do this? Has he done it? If not, then may the accused suffer not a little from such judicial negligence, involving, as it does, much ignorance where knowledge is truly power. The medical witness must study books on medical jurisprudence. He must attend lectures about it, as a branch of his professional education. He goes into court prepared by knowledge for his great office; and if he have it not, he meets its sure consequences. He may and must use such knowledge. Books would serve only to confirm, what his memory allows him to declare.

Another important matter for the physician in court. He may, on the stand, consult the notes he has taken of the case, concerning post-mortem appearances, chemical analyses, quantities, numbers, &c. He may do this under the rule, "to *refresh his memory*," but not to get *information*. Is there not the same analogy between what we have read and about which we have deeply thought, as between notes and their use on the stand? We do not mean in these questions to attempt the vain office of altering judicial rules, but to state to the medical witness what he *may* and what he *may not* do.

There are other annoyances in court which have their source and character in those who are more or less concerned in the administration of public justice. We have had but little experience here, but we have seen the effects of court ethics upon others. We recal an instance, but it was one which can hardly be repeated. A person was indicted for two capital felonies, alleged to have been committed in the same place, and at the same time, viz., murder and arson. We were summoned for the defence in both trials. The verdict was for the accused upon the first. The second trial soon came on. Upon our cross-examination, we observed the District Attorney had a small book in his hand—a green-covered book—from which he read during the whole of our

examination. As soon as we left the stand, we took a seat next to the attorney, and asked him what book it was which he read so attentively during our examination. He said it was an old interleaved Massachusetts Register, in which he had entered all the questions put to us on the first trial, together with their answers. And he used the book to see how nearly our answers in the arson trial, corresponded with those given in that for murder. "And the result?" asked we. "Very, very, correct," was the answer. We had not dreamed of such an use of the small, green-covered volume; and the annoyance was in an occasional self-questioning as to the book, its contents, &c. We have seen much discomfort, and even distress, produced by examinations of other witnesses, in which we have been an associated witness, and in which it has been our sincere pleasure to find the court interfering to protect the witness, and to let the offending counsel know what the court thought of his conduct, and to give him a lesson on the duties of adverse lawyers in obtaining testimony for, or against, him, or her, on whose behalf he had been employed.

In a trial for adultery, a middle-aged woman—a Swede, of very prepossessing appearance—took the stand for the defence. She testified to an occurrence on the day in which the crime was alleged to have been committed, which occurrence proved that the accused could not have been where he could have committed it—in other words, an *alibi*. It was Tuesday, the 11th of June. The circumstances which proved this statement to be true to the witness, were personal to her, and were of a character to show that her testimony was strictly correct. The testimony was exceedingly important, and the adverse counsel did all in his power to break it down.

"Why, madam, might it not have been on Monday, the 10th, that such and such things happened?" The reasons were given, in answer. "Why might it not have been on Wednesday, the 12th, instead of Tuesday, the 11th?" "You swore that it was on such an hour of Tuesday, the 11th, that you visited Mrs. ———; might it not have been at some other hour? Take time, you are on your oath."

Thus proceeded the *question*, to the evident distress and embarrassment of this woman, a stranger to our country, its language and customs. At length the Chief was roused, and said to the counsel, in a manner perfectly courteous, but the whole meaning

we all understood, "It is an ultimate fact in the mind of the witness that it was on Tuesday, when she was to visit Mrs. ———, and an ultimate fact is not a matter for explanation or reasoning."

We remember a trial for assault and battery in which we were a witness, as well as in the preceding one; in which the judge who tried the cause said to the counsel for the defence, that his conduct and his manner had so overcome the witness that she could say no more, and desired her to take her seat.

In a case of alleged infanticide, a witness was very hard pressed by the government, and at length, not being able to bear the rough handling any longer, said, with questionless emphasis, "Mister, you mean to make me lie, but I won't." Some of the audience let him know, in a still small voice, that they were pretty much of the same mind with the witness. This course on the part of the witness, was taking the law into one's own hands. We do not recollect that the court or the sheriff has ever interfered with such use of one's own power, or with those who expressed their approbation of its exercise.

The above case was of much interest in its medico-legal bearings. A female servant had been ailing some time, but one morning looked so much feebler than usual, that her mistress asked her if she were ill. She said "No." Her bed was examined, and found to be very bloody, and blood was traced on the stairs to the privy. This was examined, and a child was found in the vault. In the chamber was a flat-iron, the sharp angle of which was bloody, and hair found sticking to it. A coroner, informed of these facts, called a jury together, Dr. ——— being one. The infant's body being looked at—for it was not in a condition for very free, if any handling—the skull was found broken in, and the scalp much wounded. There was a rope round the neck, and the throat was cut. My friend, Dr. ———, thought these marks of violence made out so clear a case of wilful killing, that he said a *post mortem* was unnecessary. The woman was arrested, and brought to trial for child-murder.

We were summoned as an expert. The foreman of the jury was a very intelligent man, and in the course of our examination, asked if there were not such evidence furnished by the lungs and heart as would go far to prove whether the child was still-born, or was born alive. We said "Yes," and described the *docimasie pulmonaire*—pulmonary proof. The foreman understood at once

that a very important point had been overlooked at the inquest. There was no proof that the child had ever lived; and hence, none that it had been *killed.* A fatal error was discovered in the indictment—the words, "being born alive," being omitted in the description of the child.

The evidence being all in, the pleadings were about to be begun, when an officer of the court came in, and begged to communicate some very important testimony from the prisoner. The usual questions were asked, as to the circumstances under which the testimony was offered, &c., and being satisfactorily answered, it was agreed by the government and the defence that the communication should be received. The officer then said that the prisoner had made confession that she killed the child. She was found guilty of murder, but, on account of various palliating circumstances, was sentenced to imprisonment in the common jail for life. She died not long after, of consumption. But for the confession, it is not at all probable she would have been found guilty.

This case has been introduced because of its important medico-legal teachings. Above all, does it show how important it is that in the examination of dead bodies, where a suspicion exists that the death came of violence, the utmost care should be taken that the whole evidence be forthcoming under the requirements of the criminal law.

Malpractice.

We have seen the physician in court as a witness. We have now to see him in a different position—as a defendant. He is now on trial. If his first relation to jurisprudence were embarrassing, in every sense so, it is easily perceived that this new one can be almost anything but agreeable.

The question is of legal responsibility, as it affects physicians. Our author has devoted much of his work to this question; and the ability with which he has done this, gives to his volume great value, and makes him a large benefactor to the profession. Our article has already reached such a length that we have but little room for the discussion of a question of the highest importance in medical jurisprudence. We cut the following from a newspaper some time since; and it presents our subject after a manner so clear, that we offer it to our readers:—

"Legal Responsibility.—Judge Minot, of Pennsylvania, has laid down the following rules of law as applicable to physicians:

"1. The medical man engages that he possesses a reasonable degree of skill, such as is ordinarily possessed by a profession generally.

"2. He engages to exercise that skill with reasonable care and diligence.

"3. He engages to exercise his best judgment, *but is not responsible for a mistake of judgment.* Beyond this, the defendant is not responsible. The patient himself must be responsible for all else; if he desires the highest degree of skill and care, he must secure it himself.

"4. It is a rule of law that a medical practitioner never insures the result.

"These are received in general as sound views, and such as will govern every enlightened court. There could scarcely be a greater absurdity, than to require physicians and surgeons to insure the result, when they can in no case control all parts of the treatment. Few serious cases are carried through a single day, and many not a single hour, without a violation of instructions, on the part of nurses and attendants."

So far the extract.

The last paragraph contains an important truth. It would have been more complete, had it stated that not only "nurses and attendants," but patients themselves, will disturb dressings, move limbs, show what they can do, as the phrase is, and abuse the surgeon for his tyranny, and then, if a bad cure is produced, sue him for damages.

Malpractice is almost exclusively charged on surgical practice. Except for medical treatment of diseases of the eye, we do not find a case of charged malpractice in the treatment of disease, distinctly so called. A case of alleged malpractice in the medical treatment of a diseased eye was tried in the October term of the Ohio Supreme Court, in 1857, which attracted much attention and occupied a long time. We make an extract or two from the charge, as it has distinct reference to medical responsibility.

Brinkerhoff J. charged the jury, "That the law did not require of the defendants eminent or extraordinary skill; that this kind of skill is possessed by few. An absolute necessity requires that the wants of a community must be supplied with the best medical knowledge its means and location will command. To require the highest degree of skill would deprive all places, except large cities, of medical men. The medical profession is as upright, as

self-sacrificing and as useful as any other—none can do without their assistance in some period of life—and they are eminently entitled to protection at the hands of the court. The surgeon is not a warrantor, or a guarantor of a cure. It would be monstrous to require it at his hands; it would be alike monstrous to hold a physician liable for mistakes, if he brings to bear ordinary skill and care," &c.—Elwell, p. 162.

One other case of medical malpractice may be referred to—the case of the Commonwealth of Massachusetts v. Samuel Thomson, for the alleged murder of Ezra Lovett, by lobelia. Thomson was acquitted, on the ground that the evidence did not show malice on the part of the prisoner, or make out a case of manslaughter.

It is in surgery that malpractice has been most frequently charged; and our author has given many and various adjudicated cases in Europe and America. Surgery presents the most difficult cases for legal investigation and settlement. You may examine the most complicated machine ever presented in a patent case, and there shall not be found the least difficulty of learning concerning it any and every matter which can be in dispute. But when you come to the human, living machine, the common mind is not able to understand so much of it as to arrive at any safe conclusions in the midst of the conflicting assertions and opinions of professional men. We know few more unprofitable and melancholy sights than are presented in courts of justice in the collisions, the quarrels of surgical witnesses. The very fact that both theoretical and practical views should so strongly militate—that a demonstrative science should be, and is, subjected to the same varieties and oppositions of opinion as are the most obscure matters in intellectual philosophy, makes a case for the popular, common mind, which it cannot compass—about which it literally proves nothing, and about which it can be taught nothing. We remember, and never can forget, a charge to a jury in a case of surgical malpractice, which was the wisest one which has come within our reading. The presiding judge was held in very sincere and high respect by his brethren and the public. We quote from memory.

"We have been many days on this trial; we have had many surgical witnesses—experts. We have had anatomy, and physiology, and pathology, and surgery. My knowledge of these is slight. In anatomy, I know but little if anything beyond what is contained in an old book, which doubtless you, gentlemen of the

jury, have often read: WE ARE FEARFULLY AND WONDERFULLY MADE."

We remember a case which made a good deal of noise in the time of it, and in which the council for the plaintiff declared his ignorance of the whole matter by attempted witticism. The case was dislocation of the hip-joint. A very distinguished teacher of anatomy, who was also an highly esteemed surgeon, was summoned, and described the various directions which dislocated hip might take. The counsel for the plaintiff—a young man—did all he could to break down, and so destroy the influence of this witness; and in the course of his argument, stated, in amount, that he, the surgeon, had said that the dislocation was upward and downward, backward and forward, inward and outward—making a very important part of the testimony to seem ridiculous as well as impossible.

Now when we recollect what is the knowledge of a jury, taken at large, of matters of description which require great study for their apprehension, and much thought to reach their natural uses, and the disturbances which accident or violence may produce in themselves and in their relations with neighboring parts—when we take these things into account, we cannot be surprised that a jury should be influenced by the most distorted presentations of testimony, the elements of which, counsel know so imperfectly, and especially when accompanied by eloquent appeals to the sufferings and great injury which the alleged malpractice has produced. We need not argue or illustrate this matter farther. The question arises, what shall be done to remedy so glaring a defect in our jurisprudence—a defect involving so much evil to the accused, and to a profession. The law has settled this, in its benign and most just rule, that a person accused of a crime shall be tried by his peers. We have seen that the Lords of England have no equals in the state—are peerless—and therefore try themselves. Why should not the same rule of law be extended to the medical profession, which has no equal out of itself, and the members of which cannot be wisely or justly tried by any other members of a community. No one at all acquainted with the present mode of trying cases of malpractice, can fail to have been convinced of their entire and necessary mismanagement—the witnesses being in direct conflict; and the whole balance of the apparatus of cri-

minal jurisprudence being in utter ignorance of the nature and causes of the professional quarrel. Said a Solicitor General once to us, "If you would have 'confusion worse confounded,' call on different sides two or more doctors to the stand, and you will have an illustration which cannot be misunderstood."

In both army and navy, officers are tried by their peers—by themselves. And the clergy, in every matter relating to their profession, have recourse to the same rule, and are tried by their peers. The law, of course, has the same privilege. Physicians ask for nothing more, and in no other way is it possible for them to get justice. The broken bone of a limb has been set in the best manner. Approved apparatus has been applied to keep the parts in place. The fracture is oblique. Every thing promises well. Friends get dissatisfied, and recommend their physicians, who, in their opinion, have great skill in surgery. The regular attendant is dismissed. His apparatus is removed. The newcomer knows nothing about the kind of fracture; new means are applied. The bones unite. The leg is an inch or two too short. This deformity is, of course, charged upon the first surgeon. His bill is disputed. The lame man is advised to sue for damages. He does so; and it is more than an even chance the surgeon loses his case, and with it his bill, and has damages and costs on his shoulders to boot. We have actually been told that in a certain county, of a certain State, the jury in all suits for malpractice give their verdict for the plaintiff; and that same county, it is said, tries more of such cases than all the others of the *Commonwealth* put together. It may be questioned if that expressive word for State is not unhappily applied to such a community. Woe to that surgeon who has in charge an accident in that county. The common victualler must have bed and board for the traveller, or forfeit his license. The surgeon of —— county must have all skill, and all apparatus, for all sorts of fractures, &c. But the all and the best will avail him not, if a Haman be "round." His first fracture will be fatal to him. The jury care not a fig what bone is "broke," or how, or how treated. They know that the *defendant* is not the *plaintiff*, and that sufficeth.

We have finished our work, and unconsciously have spread it over more ground than we dreamed of when it was begun. It contains reminiscences of cases adjudicated, most of them many, many years ago, but as fresh in memory as if of yesterday. There may

be an interest in the records of actual observation and experience which other abstracts may want. The experiment at least seemed worth making, and the time taken for the effort may not have been wasted if our object be obtained.

We heartily commend Dr. Elwell's work to our readers. It is from one who knows well what his profession wants in such a work; and in our judgment he has met and satisfied the demand.

Note.—At page 300, it is said that books are not allowed to be read from by the witness. He is not allowed to refer to, or quote them. In a trial in which we were a witness, somnambulism was in the defence. In Elliotson—doubtless from the State Trials—the case is given of a somnambulist, the brother of a nobleman, who rose one night and went to the horseguards and fatally shot one when on duty. He was tried for murder, and was acquitted on the ground that he had done the deed during somnambulism. We were not allowed to state this case.

In a trial for matricide, by a little girl 12 or 13 years old, whose mother was a confirmed drunkard, and who had wholly neglected her child, moral insanity was advanced in the defence. It was rejected, and among other reasons because in a late London Law Reporter the plea of moral insanity had been ruled out. Now why was the prosecuting attorney allowed to make this quotation, and a professional witness forbidden to refer to a case exactly in point in the somnambulic case? It was from a law book the attorney had quoted. And it was from the same we proposed to give a case, viz., from the State Trials. We recollect that there was a question of the justice of the ruling in the two cases; in other words, if the government had any better right to the kind of testimony involved than the defence. A million of people were trying that poor, ignorant, most wretched, helpless child; for in a legal sense that same child might murder each and all of that million. Had not she as perfect and as legal a right to the same defences as had the endangered million?